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Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

CONSUMERS UNION OF UNITED STATES, INC.,

Petitioner,

v.

SUZUKI MOTOR CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny, this Court held that defamatory speech regarding public officials and public figures is actionable only if the plaintiff proves by "clear and convincing evidence" that the publisher spoke with "actual malice" – *viz.*, that the publisher either lied or entertained serious doubts about the truth of its statements. In *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), this Court held that the court must "independently examine" the "*whole* record" to determine for itself both (i) whether there is sufficient evidence of actual malice, and (ii) whether the plaintiff's theory must be rejected as a basis for imposing liability because it would intrude too severely upon First Amendment freedoms.

The questions presented by this case are:

1. Whether and to what extent the "independent examination" rule of *Bose Corp.* v. *Consumers Union* applies to a court's disposition of a publisher's motion for summary judgment.

2. Whether the First Amendment permits an inference of "actual malice" to be drawn from (i) the publisher's substantive and well-articulated disagreement with the government, or (ii) the publisher's financial status.

PARTIES TO THE PROCEEDINGS BELOW

All the parties to the proceedings below are listed in the caption.

RULE 29.6 STATEMENT

Petitioner Consumers Union of United States, Inc. has no parent corporation and no publicly held company owns 10% or more of the corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Consumers Union of United States, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW AND JURISDICTION

The Appendix reproduces the amended panel opinions (App. A, 330 F.3d 1127), the order denying rehearing en banc with accompanying dissent (App. B, 330 F.3d 1110), and the district court's opinion (App. C) and findings of fact and conclusions of law (App. D). The court of appeals denied rehearing en banc on May 19, 2003. Pet. App. 47a. This Court has jurisdiction under 28 U.S.C. 1254.

RELEVANT CONSTITUTIONAL PROVISION

The First Amendment to the U.S. Constitution, made applicable to the states by the Fourteenth Amendment, provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech, or of the press." U.S. Const. amend. I.

STATEMENT OF THE CASE

This case presents two fundamental and recurring questions of First Amendment law relating to the "actual malice" standard of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). In *Sullivan* and its progeny, this Court held that defamatory speech regarding public officials and public figures is actionable only if the plaintiff proves by "clear and convincing evidence" that the publisher spoke with "actual malice" – *viz.*, that the publisher either lied or entertained serious doubts about the truth of its statements. In *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), this Court held that the court must "independently examine" the "*whole* record" to determine for itself both (i) whether there is sufficient evidence of actual malice, and (ii) whether the plaintiff's theory must be rejected as a basis for imposing liability because it would intrude too severely upon First Amendment freedoms. "The question whether the evidence in the record in a defamation case is sufficient to support a

finding of actual malice is a question of law." *Harte-Hanks Communications* v. *Connaughton*, 491 U.S. 657, 685 (1989).

Bose was a post-trial appeal, and this Court has not decided whether and to what extent the "independent examination" rule applies to a publisher's motion for summary judgment. Over the dissent of Judge Kozinski for *eleven* judges, who called the decision a "grievous[]" error and invited review by this Court (Pet. App. 50a, 55a), a divided panel of the Ninth Circuit became the first court to hold that, on summary judgment, the independent examination rule permits the court to consider only whether a "plausible" reading of the plaintiff's own evidence in isolation – *i.e.*, without regard to even the undisputed record facts supporting the publisher – might lead a jury to find clear and convincing evidence of actual malice. *Id.* 16a.

The Ninth Circuit majority separately held that a publisher's substantive and well-articulated disagreement with the government can establish clear and convincing evidence of actual malice, reasoning that disagreement with the government represents the "purposeful avoidance of the truth." Pet. App. 23a. The Ninth Circuit also held that an allegation that the publisher was financially overextended could support a finding of actual malice because it gives the publisher an incentive to engage in false and inflammatory speech. *Id.* 22a.

This petition accordingly presents the questions (i) whether and to what extent the *Bose* "independent examination" rule applies to a court's evaluation of a publisher's motion for summary judgment, and (ii) whether the theories of liability endorsed by the court of appeals in this case unduly intrude on First Amendment freedoms.

1. Petitioner Consumers Union of United States, Inc. (CU) is the not-for-profit publisher of *Consumer Reports*, the nation's most respected consumer publication. As Judge Kozinski recognized, "A significant portion of the American public relies on CU's ratings on a regular basis, and almost everyone consults *Consumer Reports* now and then before making a significant purchase – whether a sound system, a dishwasher or a car." Pet. App. 49a.

The integrity of CU – which accepts no outside advertising, no product samples, and no corporate sponsorship – is vital to its mission of advising consumers through credible, independent product reviews, and has long been reaffirmed by the courts. CU's "most important asset is its good name for independence and accuracy; its reputation as an impartial and untainted adviser is the foundation upon which the public's confidence rests." *Consumers Union* v. *Theodore Hamm Brewing Co., Inc.*, 314 F. Supp. 697, 700 (D. Conn. 1970). See, *e.g.*, *Bose Corp.*, *supra*; *Cranberg* v. *Consumers Union*, 756 F.2d 382 (CA5), cert. denied, 474 U.S. 850 (1985); *Yiamouyiannis* v. *Consumers Union*, 619 F.2d 932 (CA2), cert. denied, 449 U.S. 839 (1980); *Quantum Elecs. Corp.* v. *Consumers Union*, 881 F. Supp. 753 (D.R.I. 1995); *Simmons Ford* v. *Consumers Union*, 516 F. Supp. 742 (S.D.N.Y. 1981). Nonetheless, because CU is so widely read and respected, and its reviews are so complete and candid, it "attracts lawsuits like moths to a lantern" from "disgruntled CU reviewees seeking revenge through the courts." Pet. App. 54a, 69a (Kozinski, J.).

This lawsuit arises from a *Consumer Reports* review that concluded that the 1988 "Samurai," a sport-utility vehicle (SUV) manufactured by respondent Suzuki Motors, was "Not Acceptable" because of its propensity to severely tip up on two wheels in emergency maneuvers. CU tested four SUVs, including the Samurai, which as respondent admits was by then "already attracting controversy" (Resp. C.A. Br. 2) amidst emerging public concern that SUVs had a disproportionate life-endangering tendency to tip up and roll over. In a detailed 6500-word review published in July 1988, CU concluded that, "[i]n our judgment, the Suzuki Samurai is so likely to roll over during a maneuver that could be demanded of any car at any time that it is unfit for its intended use." Pet. App. 241a. (CU's findings, as well as the full disclosure of its testing, are set out in the review, which is reproduced as Appendix E.) Suzuki threatened suit at the time, but never took any action.

CU republished its conclusion regarding the Samurai at least *twenty-four times* between 1988 and 1995. Pet. App. 166a ¶¶ 318-22. Suzuki neither sued nor even complained.

In 1996, CU made the two statements now at issue. The January 1996 sixty-year commemorative issue of *Consumer Reports* noted sixty significant consumer events since 1936. One was a thumb-nail-sized photograph taken of the Samurai tipping up severely, accompanied by the following text: "*1986* CU buys its own auto test track in rural Connecticut. Two years later based on tests conducted there CONSUMER REPORTS discovers the Suzuki Samurai easily rolls over in turns and rates it Not Acceptable. Sales of the Samurai dwindle away. Since 1936, dozens of products, from chemistry sets and toasters to power mowers and child safety seats, have been identified as safety hazards and rated Not Acceptable." App. J, 35a.

The second statement appears in a 1996 CU Background Paper for press inquiries: "In 1988, we developed the 'short course' because we discovered that the Suzuki Samurai, then undergoing testing, showed a propensity to roll over during our long course AM maneuver." See Pet. App. 34a.

2. Though by 1996 it was no longer selling the Samurai in the U.S., Suzuki responded by filing this product disparagement action in California. Suzuki's fanciful theory is that CU and its employees in 1988 – *i.e.*, eight years before the statements now at issue – formed a secret conspiracy to rig a test that would cause the Samurai alone to tip up, so that CU could publish a negative review of that vehicle, so that sales of *Consumer Reports* would go up, so that CU could finance a capital campaign, all without being discovered, which would have destroyed the public credibility that has always been the *sine qua non* of CU's existence.

Suzuki took exceedingly wide-ranging discovery and the parties compiled a "voluminous record." Pet. App. 78a. Suzuki deposed virtually every person even remotely involved with the testing of the Samurai and the researching, writing, and editing of the review. Those deposed ranged from the facilities manager of the test track to the President of Consumers Union; from the most junior auto technician to the head of the auto test division; from an editorial researcher to the editorial director of *Consumer Reports*. Together, the parties took more than fifty depositions. Suzuki also sought and obtained the complete test and editorial

files not only for the 1988 article, but also for every vehicle ever tested by CU in a similar manner. This amounted to tens of thousands of documents, videotapes, and other records. After the completion of all discovery, the parties in their summary judgment filings distilled this massive amount of evidence to thirty-one declarations and 390 exhibits. The record on appeal contains nearly 7000 pages.

The district court granted CU's motion for summary judgment, entering an opinion (App. C) and hundreds of findings of undisputed fact (App. D). Because Suzuki is a public figure and the SUV safety controversy is a matter of high public importance, the court held that Suzuki's disparagement claim is subject to heightened First Amendment protections. Although factual findings in ordinary civil litigation are reviewed for "clear error," *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), requires judges in cases subject to the First Amendment protections of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), to undertake an "independent examination" of the question of actual malice. *Anderson* v. *Liberty Lobby*, 477 U.S. 242 (1986), holds that courts must apply the "clear and convincing evidence" standard in evaluating a defendant-publisher's motion for summary judgment.

The district court held that, under the "independent examination" rule of *Bose*, it was required to determine not merely whether there was a factual question for the jury but whether, as a matter of law, the evidence could support a finding of actual malice. Citing *Anderson* v. *Liberty Lobby*, the court "viewed all the evidence in the light most favorable to plaintiff," but "compress[ed] cartloads of evidence *into a legal conclusion*." Pet. App. 83a (emphasis added). The court accordingly "exercise[d] independent judgment and determine[d] whether the record establishes actual malice with convincing clarity." *Id.* 82a (quoting *Bose*, 466 U.S. at 514).

The district court rejected Suzuki's contention that the court could examine only the "evidence that *it* [Suzuki] ha[d] presented," which it had "culled" from the voluminous record, recognizing instead that a court is required to consider "*all* the evidence." Pet. App. 78a, 80a, 83a (emphases added). The

"context" of the events, rather than isolated excerpts, was thus highly relevant. *Id.* 83a.

The district court found no genuine dispute regarding hundreds of facts refuting Suzuki's speculation that CU had rigged the tests of the Samurai. A substantial body of undisputed evidence documented CU's good faith: In sum, CU "believed at the time it published the article and still believes that the article was truthful, accurate, and fair." Pet. App. 146a ¶ 238. See also *id.* 140a-142a ¶¶ 217-23.

The district court found it undisputed that CU knew, before its own testing, that the Samurai was the subject of serious allegations that the vehicle posed rollover dangers. Pet. App. 109a ¶ 86. For example, the *New York Times* reported a "feeling of instability at speed and in the curves" and that the vehicle was "fairly tipsy"; the *Washington Post* reported a near roll-over during testing; the *Philadelphia Daily News* called "a sudden, abrupt maneuver at speed" in the Samurai "courting Highway Hari-Kari"; the *St. Petersburg Times* reported that some insurers were refusing to cover the Samurai.

NBC-TV also aired a three-part series quoting experts describing the Samurai's dangerousness and showing video clips that "vividly depicted the Samurai tipping up during test maneuvers." *Id.* 101a-102a ¶¶ 53-56, 107a-109a ¶¶ 74-85. CU's concerns after viewing the NBC program that its staff could be injured were so substantial that it added safety "outriggers" (essentially, training wheels) during emergency handling tests of the Samurai. *Id.* 109a-110a ¶¶ 87-88.

The district court found it undisputed that these criticisms were confirmed during the standard preliminary "break-in" period of CU's testing. The Samurai purchased by CU rolled over on a snow-covered gravel road while traveling *at only fifteen mph*. Pet. App. 104a-106a ¶¶ 63-71.

CU has been testing automobiles for decades. As the district court found undisputed, the engineers, researchers, writers, editors, and executives involved in CU's testing and publishing (including with respect to the Samurai) are all trained professionals, most with advanced degrees and years of experience. Pet. App. 90a-94a ¶¶ 12-19, 97a ¶ 38. Since 1973,

one of CU's principal safety tests for automobiles (known as the emergency avoidance maneuver or "long course") has involved drivers steering quickly around an obstacle on a course defined by cones. That test measures the vehicle's response to emergency steering, especially at the limits of the vehicle's handling ability, and was not designed to assess a vehicle's propensity to roll over. *Id.* 98a-101a ¶¶ 43-50, 52.

The Samurai performed well during the traditional emergency avoidance maneuver steering test conducted by two professional drivers – so well that concerns over the safety of CU's test drivers were allayed and the safety outriggers were removed for the second driver's testing. Pet. App. 111a-113a ¶¶ 97-104. That might have been the end of the matter, but for the fact that, with the outriggers still removed, CU's technical director, Dr. R. David Pittle, sought to perform the test on both the Samurai and the Wrangler. *Id.* ¶ 105. On his tenth run through the course with the Samurai, he made a slight steering misjudgment, and the vehicle lifted onto two wheels, which the district court found was indisputably "a startling and unexpected occurrence." *Id.* 114a-115a ¶¶ 108-16.

CU then adjusted the course to duplicate the path of Pittle's tenth run to determine whether the tip-up reflected a flaw in the SUVs that was not detected initially. This adjusted "short course" required the test driver to make sharper turns at somewhat slower speeds. Pet. App. 115a-116a ¶¶ 117-20. The district court found it undisputed that CU's adoption of the short course reflected *not* an attempt to disparage Suzuki or the Samurai but instead an effort to fulfill "its mission [of] protecting the consumer, * * * particularly given the background information already known about the Samurai." *Id.* 83a.

When driven on the short course, the Samurai lifted onto two wheels multiple times. Pet. App. 118a-120a ¶¶ 129-36. CU tested three other SUVs under identical conditions; *none* tipped. *Id.* 121a ¶¶ 137-39, 125a ¶¶ 153-56. After learning that Suzuki offered a new 1988½ Samurai, CU purchased and tested that as well. Like the 1988 Samurai, this newer model tipped multiple times. *Id.* 122a-124a ¶¶ 140-51.

The district court found it undisputed that CU's conclusions about the Samurai were confirmed by several independent events subsequent to 1988 but prior to CU's 1996 statements at issue in this case. Suzuki itself had never sued after either the initial review or the twenty-four published reiterations of CU's findings from 1988 to 1995, facts that "strengthened CU's belief in the validity of CU's reports on the Samurai." Pet. App. 166a ¶¶ 321-22. An English consumer testing organization found that the Samurai had a propensity to roll over in emergency maneuvers. *Id.* 150a-153a ¶¶ 257-65. The Attorneys General of seven states charged Suzuki with false and misleading advertising regarding the Samurai's rollover potential. Suzuki settled, including by paying a $200,000 fine and agreeing to include safety warnings in its advertising. *Id.* 159a ¶¶ 282-83. In a rollover product liability case, a federal judge entered a default judgment against Suzuki for deliberately covering up evidence of the Samurai's danger, a sanction the Eleventh Circuit affirmed as "richly deserved" because respondent and its lawyers "engaged in an unrelenting campaign to obfuscate the truth" and made a "bad faith decision to avoid revealing the truth at all costs." *Malautea* v. *Suzuki Motor Corp.*, 148 F.R.D. 362, 365 (S.D. Ga. 1991), aff'd, 987 F.2d 1536, 1541-42, 1544 (CA11), cert. denied, 510 U.S. 863 (1993). See Pet. App. 161a-163a ¶¶ 291-95, 298-300.[1]

The district court concluded that, in the context of this record, a jury could not find by clear and convincing evidence that CU had acted with actual malice. The foregoing evidence completely overwhelmed the isolated assertions put forward by Suzuki, which rested on circumstantial allegations and were contrary to the record as a whole:

- Suzuki argued that the Samurai passed CU's traditional avoidance test and tipped up only on a course designed to replicate the path taken by Dr. Pittle. Pet. App. 83a. The district

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[1] In the May 1992 *Consumer Reports*, CU reported on the court ruling, stating that Suzuki knew about the rollover defect before selling the Samurai in the United States. See App. H. Suzuki neither complained nor sued CU.

court found it undisputed, however, that the short course was not implemented to impugn the Samurai but to "determine if the results [of the Pittle tip-up] were an aberration or if the Samurai and all or some of the other SUVs tested would experience rollovers." *Id.* 115a ¶ 118. The court found it undisputed that "[*t*]*here is no evidence*" that CU's drivers attempted to tip the Samurai. *Id.* 126a ¶¶ 158-59 (emphasis added).

- Suzuki pointed to four comments by CU's staff during the testing: "If you can't find someone to roll this car, I will" (allegedly stated by CU's Editorial Director); "I think I got that, I think I got that!" (staff member upon seeing Pittle's tip-up); "All right Ricky baby!" (staff member upon seeing tip-up and safe landing); and "Can't you just see it, we get no lift off the ground, Oh God" (Pittle in later preparing to video-tape a test of the newer 1988½ Samurai). Pet. App. 79a-80a. But the district court concluded that there was "no evidence that anyone instructed [the drivers] to deliberately tip up the Samurai." *Id.* 116a ¶ 121. And there was no dispute that staff had cheered on the runs by Pittle (who was not a trained test driver) in which *no* tip occurred. *Id.* 114a ¶ 112.

- Suzuki noted that the Samurai review was drafted before CU's auto test division submitted a report on the test results and before all the testing was completed on the other SUVs. Pet. App. 79a. The district court found no dispute, however, that this drafting process for the review was actually used "to bring to bear [CU's] highest level of editorial oversight, skill, and experience." *Id.* 133a ¶ 182.

- Suzuki pointed to the assertion of the National Highway Traffic Safety Administration (NHTSA) – in its denial of a petition filed by the Center for Auto Safety seeking a defect investigation of the Samurai – that CU's testing was too driver dependent. Although NHTSA found that "CU and [NBC's] tests raised some concern" about the Samurai, it opined that CU's testing was too influenced by driver variability. There was no dispute, however, that "CU's engineers and research[ers] analyzed NHTSA's published denial and disagreed substantively with NHTSA's ruling and written decision," subsequently "publish[ing] an article expressing [CU's] disagreement" and

openly addressing those disagreements multiple times. Pet. App. 155a-158a ¶¶ 272, 275, 279-81, 184a-189a ¶¶ 391-92, 394-402; see also App. G, I (reproducing CU's internal analysis and its published response). The district court recognized that "CU's difference of opinion" with NHTSA could not "compel the trier of fact to conclude that" CU was "intent upon deliberate or reckless falsification," especially since "part of the First Amendment's protection has to do with disagreeing with the government." *Id.* 84a. Further, "*NHTSA was misled by Suzuki* in 1988 as to the scientific and real-world nature of CU's short course avoidance maneuver test" (*id.* 84a ¶ 376 (emphasis added)), and other auto manufacturers "use the CU long course and short course avoidance maneuvers tests" (*id.* 181a ¶ 381). Therefore, the court concluded that CU did not "purposefully avoid" the truth. *Id.* 84a.[2]

• Suzuki argued that CU was financially overextended eight years before the statements now at issue, and that CU had referred to its findings regarding the Samurai in fundraising. Pet. App. 80a. The district court found it undisputed that CU did not attempt to manipulate the testing for any reason, including for fundraising. See *supra* at 6-7. Further, even if "relevant," a "goal of increasing one's profits through publishing material is not sufficient to prove actual malice." Pet. App. 84a (citing *Harte-Hanks*, 491 U.S. at 667).

3. Suzuki appealed, arguing that *its* evidence precluded summary judgment. Suzuki's opening brief thus omitted *any* reference to, for example, the newspaper and television reports finding that the Samurai presented a rollover danger; the fact that CU's own test Samurai rolled over in normal use at only 15 mph; the findings of other organizations and courts subsequent to 1988 that confirmed CU's conclusions; the fact that Suzuki had been sued by seven states over the rollover danger; the fact that a court had found that Suzuki had covered up the rollover risk; or CU's publication of a detailed response to NHTSA's

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[2] To the extent other governments agreed with NHTSA, the district court found it undisputed that CU was unaware of that fact. Pet. App. 173a ¶ 338.

disagreement with CU's testing protocols. Suzuki thus relied on Ninth Circuit precedent holding that "summary judgment should be denied where *the non-movant* presented evidence 'from which a jury *might* return a verdict in its favor.'" Resp. C.A. Br. 33 (citations omitted) (first emphasis added) (brackets omitted). "Thus, a reviewing court must assess all the evidence presented by *the non-moving party* in the aggregate and determine whether *that evidence*, viewed in its 'totality,' would be sufficient to support a jury finding." *Id.* (emphases added).

A divided panel of the Ninth Circuit agreed with Suzuki's argument that only its own evidence was relevant and reversed (Pet. App. 2a-35a) over bitter panel (*id.* 36a-46a) and en banc dissents (*id.* 48a-73a).

a. The panel majority held that CU should have been denied summary judgment with respect to its two 1996 statements that CU in 1988 had "discovered that the Suzuki Samurai * * * showed a propensity to roll over" and "discover[ed] that the Suzuki Samurai easily rolls over in turns." Pet. App. 34a-35a (Graber, J.) (emphasis omitted). In the court of appeals' view, "a rational jury [could] find, by clear and convincing evidence" (i) "that CU developed the short course *before* discovering a rollover 'propensity' and *in order to create* a rollover propensity, not *because of* it," and (ii) "that what CU discovered was that the Suzuki Samurai did *not* roll over 'easily' in turns, but had to be coaxed." *Id.* (emphases in original).[3]

In reaching that conclusion, the Ninth Circuit rejected the district court's legal standard. Whereas the district court had held that the *Bose* independent examination standard was fully applicable on summary judgment (see *supra* at 5), the panel majority held that that test applies only to "the review of a

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[3] Judge Tashima's majority opinion set forth the court's legal standard and cited the evidence submitted by Suzuki that supposedly could establish actual malice. Pet. App. 2a-29a. Judge Graber concurred in part, joining Judge Tashima's discussion of the legal test and the "evidence detailed" therein. *Id.* 30a-35a. But Judge Graber specified that Suzuki survived summary judgment only as to the two statements discussed in the text. *Id.* 34a-35a.

judgment rendered after trial." *Id.* 16a n.10. See also *id.* 32a (Graber, J.) ("courts must apply the independent examination rule differently in the summary judgment context than when reviewing a judgment entered after a full trial"). The majority held that "independent examination" at the summary judgment stage is limited merely to "review[ing] the district court's decision de novo," *i.e.*, without "deference." *Id.* 14a (citations omitted). The only question for the court on summary judgment, the majority concluded, was whether Suzuki had itself isolated "adequate evidence," a "plausible" reading of which could lead a reasonable jury to conclude "that behind the veneer of accuracy, CU was disseminating the Samurai story with knowledge, or reckless disregard of its falsity. While it may be true that CU's evidence of meticulous reporting ultimately has more weight than Suzuki's evidence of actual malice, that is not a question to be resolved here." *Id.* 20a. The majority concluded that its far less rigorous standard of review was required by this Court's statement in *Anderson* v. *Liberty Lobby*, 477 U.S. 242, 249 (1986), that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."

Applying these standards, the majority held that, from the evidence presented by Suzuki, "a reasonable jury could find by clear and convincing evidence that CU had a high degree of awareness of the probable falsity of its statements about the Samurai." Pet. App. 19a. The majority saw two "plausible view[s] of the evidence" presented by Suzuki: (i) that "CU acted in good faith as a skeptical consumer watchdog should"; or alternatively (ii) that "CU 'rigged' a test to achieve a predetermined result in order to serve its own pecuniary interests." *Id.* 16a. According to the majority, "it is not our role, at this stage, to take sides" because "a jury would be entitled to believe the latter view of the evidence." *Id.*

The majority acknowledged that, at the time of the CU testing, the Samurai not only had "been the subject of news stories that highlighted its instability and propensity to tip over" but also had tipped over at only fifteen mph during CU's own

routine use. *Id.* 3a & n.2. But the court of appeals deemed those facts (and *all* of the other undisputed facts found by the district court) irrelevant given the case's procedural posture. The majority held that it was required to consider in isolation only the following facts that Suzuki had culled from the voluminous record: One witness testified to hearing the "[i]f you can't find someone to roll this car, I will" statement; Pittle then drove "the Samurai, tipping the vehicle after 10 runs to a cheer from a CU onlooker"; and CU "modified the long course, which it had used since 1973, to replicate the Pittle situation and then resumed its testing of the Samurai until it tipped up—again eliciting statements that can be construed as expressions of satisfaction." *Id.* 20a-21a. According to the majority, "This evidence is adequate to preclude summary judgment." *Id.* Notably, the majority omitted any reference to, and made no attempt to evaluate, the voluminous contrary evidence that the district court found "undisputed" and dispositive.

The majority also uncritically accepted Suzuki's hypothesis that in 1988 – well before the publications now at issue – CU "needed a blockbuster story to raise CU's profile and increase fundraising revenues." Pet. App. 22a. The only so-called "evidence" of this theory was that "CU had incurred substantial debt for a new headquarters building" at roughly that time and that CU mentioned the Samurai "in its fundraising solicitations." *Id.* The majority nonetheless deemed those facts – in isolation from all the evidence of CU's good faith, thorough reporting, and integrity – "sufficient circumstantial evidence of a financial motive" "to support the ultimate conclusion of actual malice" because it "dovetails" with Suzuki's theory of "test-rigging." *Id.*

The majority finally held that Suzuki could independently prevail on its theory that "CU failed to act reasonably in investigating and responding to contrary studies" performed by NHTSA "in a manner that suggested [CU] was attempting purposefully to avoid discovering the truth of the matter." Pet. App. 28a. "The issue is whether CU, armed with the knowledge that its tests were potentially flawed in this way, failed reasonably to investigate in such a manner that could lead a jury to conclude by clear and convincing evidence that CU was

aware of the falsity of its Samurai report." *Id.* 29a. The majority acknowledged – but deemed irrelevant – that "CU challenged the NHTSA report *head on*, stating its disagreement *in detail* and supporting its alternative conclusions *with substantive justifications*." *Id.* 28a (emphases added). But treating the issue as a factual one, rather than as a complex dispute on which experts disagree, the majority reasoned that it was required to "[d]raw[] all reasonable inferences in favor of Suzuki" on this point, such that "CU's failure to address this [supposed] deficiency with its testing procedure could lead a jury to conclude that it was aware that doing so would disclose the falsity of its negative Samurai rating." *Id.* 29a.

b. Judge Ferguson filed a panel dissent. He explained that the case directly implicated "the ongoing debate among courts and legal scholars regarding the applicability of the 'independent examination' rule to appeals from summary judgment motions" (Pet. App. 37a) and that the majority's decision conflicted with how "the independent examination rule has been applied at the summary judgment stage by other circuits" (*id.* 44a). He agreed with those circuits' holding that "the procedural protection of the independent examination rule is necessary not only for appellate review of post-trial decisions, but also for appellate review of summary judgment decisions" in cases governed by the actual malice standard. *Id.* 39a. The majority, by contrast, adopted a standard that avowedly "differs in no meaningful respect from an ordinary summary judgment appeal." *Id.* 40a.

Judge Ferguson explained that the independent examination rule requires the court to evaluate a publisher's summary judgment motion based on the "evidence in the record as a whole," not the evidence isolated by the plaintiff. Pet. App. 40a. "Because the independent examination rule allows us to view all of the evidence, and not just that which favors the plaintiff, we give maximum protection to the First Amendment." *Id.* 44a. Certainly, Judge Ferguson explained, a jury could not find "clear and convincing" evidence of actual malice on the whole record: The alleged comments of the CU staffers and the changed course design on which Suzuki and the majority principally relied are "completely consistent with the benign explanation

that [CU was] simply seeking confirmation of the existing accusations of rollover propensity," or at most "give rise to an inference of bias" as distinct from "actual malice." *Id.* 42a.

c. Judge Kozinski filed a stinging dissent on behalf of eleven judges from the denial of rehearing en banc. Pet. App. 48a-73a. They viewed the panel majority's principal legal error as its failure to recognize that the independent examination rule articulated by this Court "'assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact,'" as if the case were "the same as a slip-and-fall." *Id.* 50a (quoting *Bose*, 466 U.S. at 501). Judge Kozinski explained the judge's role on summary judgment in a case governed by *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), as follows:

> Where there are genuine evidentiary disputes over particular factual predicates of actual malice – such as questions about a witness's credibility – the issue is for the jury. The judge does not weigh the evidence to find those historical facts, but instead makes a routine sufficiency determination. After resolving the predicate factual disputes in the plaintiff's favor, however, the judge must take the further step of independently "determin[ing] whether the record establishes actual malice with convincing clarity." And *that* process is not a routine sufficiency determination, because it *does* involve weighing the evidence. If it did not, the independent examination rule would be meaningless.

Pet. App. 51a-52a (quoting *Bose*, 466 U.S. at 514) (other citations omitted) (alterations and emphases in original). On the panel majority's contrary view that "summary judgment is now governed by [a more lenient] standard, while our review after a jury verdict is governed by another" more rigorous standard, cases will "often proceed to trial, even though the court can tell ahead of time that the plaintiff's evidence will not support a jury verdict under *New York Times*." *Id.* 53a.

Judge Kozinski explained that, even if Suzuki's isolated evidence might hypothetically persuade a jury, judges conducting an independent review recognize that, "[t]o be probative of actual malice, evidence must have at least some tendency to exclude obvious innocuous explanations for the

defendant's conduct." Pet. App. 62a. Suzuki's evidence did not meet that standard. "Adjusting test procedures to better detect a risk arising from new consumer preferences is hardly reprehensible. It is precisely what one would expect from researchers seriously interested in consumer safety." *Id.* 61a. The alleged comments by CU staff members – even if true – were consistent with the fact that "the Samurai had already been slammed in the press for its rollover propensity, had been the target of a safety complaint filed with NHTSA and had rolled over on its side while a CU employee drove it at only 15 mph." *Id.* 62a. But in any event, "these fleeting remarks – three of which are no more than inane schadenfreude – would still be insufficient to support a finding of actual malice." *Id.* 63a.

According to Judge Kozinski, the majority's further reliance on CU's disagreement with NHTSA conflicts with the Second Circuit's requirement that a plaintiff must show that "bias was coupled with 'an *extreme* departure from *standard* investigative techniques.'" Pet. App. 64a (quoting *Church of Scientology Int'l* v. *Behar*, 238 F.3d 168, 174 (CA2 2001) (emphasis in Kozinski opinion)). Beyond offering a detailed response to NHTSA, Judge Kozinski asked, "what was CU supposed to do?" *Id.* 65a. "What the majority calls 'actual malice' is really just one side of a long-running debate over how to test rollover propensity most effectively." *Id.* 66a. "Which method gives the optimal mix of advantages and disadvantages is a point of disagreement among Congress, NHTSA, CU and others. It should be resolved by scientists, policymakers and consumers, not crushing libel verdicts." *Id.* 68a.

With respect to CU's alleged financial status, Judge Kozinski finally explained that, even if it were persuasive to a jury, *judges* recognize that such evidence does not tend to exclude the conclusion that a publisher acted in good faith, particularly given that "[m]any public interest groups are thinly funded, and their experiments are necessarily full of imperfections. Their targets can now stuff unflattering results into a scientific oubliette just by pointing out sources of experimental error and then threatening to sue if the groups don't 'investigate' and 'address' them. Today it's Consumers

Union panning the Samurai; tomorrow it could be Greenpeace claiming that some oil refinery is killing fish." Pet. App. 69a.

To the extent this Court's precedents could be read to permit cases like this one to go to trial, the en banc dissenters explained that this "Court would do us all a great favor by explaining that it intended no such absurdity." Pet. App. 55a.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Creates An Important Conflict Over Whether And To What Extent The First Amendment Protections Of The "Independent Examination" Standard Apply To A Publisher's Motion For Summary Judgment.

The Ninth Circuit holds that the protections embodied in the "independent examination" rule of *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), apply only to "the review of a judgment rendered after trial." Pet. App. 16a & n.10. Judicial review at the summary judgment stage is limited to reviewing the record to identify evidence *favoring the plaintiff*, and to "review[ing] the district court's decision de novo," *i.e.*, without "deference," in order to determine whether "there is adequate evidence to support" the plaintiff's position. *Id.* 15a, 20a. On that narrow view of the First Amendment's protections, the court considers only whether a jury could "plausibl[y]" find that the plaintiff's proof alone provides clear and convincing evidence of actual malice. *Id.* 16a.

As Judge Ferguson recognized, that holding gives rise to an important conflict with how "the independent examination rule has been applied at the summary judgment stage by other circuits." Pet. App. 44a. The conflict is intolerable because irreconcilable positions are taken by the courts with jurisdiction over the nation's two leading media centers: The Second Circuit's adoption of the *Bose* independent examination rule on summary judgment encompasses the publishing houses of New York, while the Ninth Circuit's rejection of the rule encompasses West Coast publishing. This disparity creates confusion and uncertainty regarding the legal protection available to publishers, amounts to an invitation to forum

shopping (given that jurisdiction in California exists over essentially any publisher), and will deter much protected speech.

The conflict is also outcome determinative in this case. Thirteen judges have applied the *Bose* "independent examination" standard to the entire record in this case – the district court (Pet. App. 82a), the panel dissent (*id.* 40a), and eleven judges dissenting from the denial of rehearing en banc (*id.* 50a) – and *every one of them* has concluded that CU is entitled to summary judgment. The two members of the panel majority reached the opposite result only because they explicitly adopted a legal standard making it substantially more difficult for a publisher to prevail on summary judgment: they refused to independently evaluate the entire record. *Id.* 16a & n.10.

This case also presents a perfect vehicle to resolve this conflict. This Court has repeatedly recognized its "vitally important" role (*Bose*, 466 U.S. at 503) in elucidating the actual malice standard through the course of "case-by-case adjudication" (*Harte-Hanks Communications* v. *Connaughton*, 491 U.S. 657, 686 (1989)). Here, the district court compiled a fully developed record. The Ninth Circuit produced four detailed opinions advocating different approaches to the case. And the court of appeals completely resolved the question of CU's entitlement to summary judgment on the question of actual malice. Failure to resolve the issue in this posture will mean that the question presented will evade review.

1. The Ninth Circuit's holding conflicts with a coherent and settled line of precedents from the D.C., Second, and Eighth Circuits. Each of those courts acknowledges and discusses this Court's decision in *Anderson* but holds that the *Bose* "independent examination" rule nonetheless applies with full force at the summary judgment stage.[4]

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[4] There is a further disagreement in the circuits over whether the "independent examination" is undertaken from the perspective of the court or instead of a "reasonable jury." For simplicity, petitioner focuses on whether, on summary judgment, the "independent examination" rule applies *vel non*.

The Second Circuit in *Herbert* v. *Lando*, 781 F.2d 298, 308, cert. denied, 476 U.S. 1182 (1986), held that on summary judgment the court must undertake an "independent review of the evidence for actual malice, as required by [the] Supreme Court in *Bose*." Emphasizing the plaintiff's "heavy burden of proof," the Second Circuit in *Lando* held that summary judgment was appropriate despite allegedly inflammatory comments by a writer for the publisher ("I'll get you" and "I'll destroy you"), particularly because (as in this case), another media outlet had deemed the report's conclusions to be accurate. *Id.* at 308-09 & nn.6-7. Citing *Anderson* v. *Liberty Lobby*, the Second Circuit reiterated the applicability of the *Bose* standard in *Contemporary Mission* v. *New York Times Co.*, 842 F.2d 612, 622, cert. denied, 488 U.S. 856 (1988), highlighting the court's obligation to independently review "the whole record" (quoting *Bose*, 466 U.S. at 499). The Second Circuit also recently affirmed the grant of summary judgment in *Church of Scientology Int'l* v. *Behar*, 238 F.3d 168, 175, cert. denied, 534 U.S. 814 (2001), on the ground that the record as a whole demonstrated that (as in this case) the challenged statement was published with "considerable corroboration" after "extensive research," and the underlying events were "accurately reported." The Second Circuit's standard is also exemplified by a decision of that court involving petitioner. In *Yiamouyiannis* v. *Consumers Union*, 619 F.2d 932, 940, cert. denied, 449 U.S. 839 (1980), that court affirmed the granting of summary judgment to petitioner on the basis of "the evidence of actual malice * * * fully marshalled" by the parties. The court of appeals relied heavily on the fact that CU's evidence showed that "the preparation of the article exemplifies the very highest order of responsible journalism." *Id.*[5]

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[5] The correct approach is also typified by another case involving petitioner, *Quantum Electronics Corp.* v. *Consumers Union*, 881 F. Supp. 753, 768 (D.R.I. 1995), in which the court "independently" examined the evidence "submitted by both Quantum and Consumers Union," including "the extensive factual record produced by Consumers Union illustrat[ing] a high level of

In *Liberty Lobby* v. *Dow Jones & Co.*, 838 F.2d 1287, cert. denied, 488 U.S. 825 (1988), and *Liberty Lobby* v. *Rees*, 852 F.2d 595 (1988), cert. denied, 489 U.S. 1010 (1989), the D.C. Circuit explicitly adopted the Second Circuit's *Lando* holding. According to the D.C. Circuit, the *Bose* standard "also applies to decisions of summary judgment." *Rees*, 852 F.2d at 598. That court took care to reject both the rationale and the result subsequently adopted by the Ninth Circuit in this case:

> First Amendment concerns also affect a court's posture in reviewing the evidence presented on summary judgment. Normally, the evidence presented upon a motion for summary judgment is construed in favor of the party opposing the motion. As to nonconstitutional issues in a libel action, this standard still obtains. However, where the constitutional prerequisites of falsity and actual malice are at issue "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the [field] of free expression." While *Bose* and prior cases involved appellate review of trial verdicts in libel actions, logic and considerations of judicial administration dictate that the same level of review apply to the granting of summary judgment.

Dow Jones & Co., 838 F.2d at 1297.

The Eighth Circuit subsequently adopted the D.C. Circuit's ruling in two separate cases. The Eighth holds that, "[d]espite the posture of the case [*i.e.*, summary judgment], we make an independent judicial evaluation of the evidence." *Price* v. *Viking Penguin*, 881 F.2d 1426, 1434 (1989). See also *Secrist* v. *Harkin*, 874 F.2d 1244, 1251-52 (CA8) (based on a "review of the evidence" in the entire record, court concludes that the

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scientific and journalistic professionalism on the part of all Consumers Union employees involved" in the project at issue. "Against this record," the court concluded, "Quantum's conclusory arguments are entirely inadequate to prove, by clear and convincing evidence, that Consumers Union acted with actual malice." *Id.*

plaintiff had not "met his burden" of proving actual malice), cert. denied, 493 U.S. 933 (1989). In *Price*, the court held that summary judgment was properly awarded, despite a supposed financial motive, because the publisher's "preparation was extensive." 881 F.2d at 1435, 1446.

The Ninth Circuit's passing attempt to distinguish the conflicting federal cases is unconvincing. The panel majority merely cited language in decisions of the D.C., Second, and Eighth Circuits to the effect that the non-movant must "present evidence to support a jury finding that he or she has shown with convincing clarity that a defendant acted with actual malice." Pet. App. 16a n.10 (quoting *Dow Jones & Co.*, 838 F.2d at 1293). But the Ninth Circuit simply ignored those courts' explicit adoption of the *Bose* "independent examination" requirement. Evidence will not "support a jury finding" consistent with the First Amendment in the D.C., Second, and Eighth Circuits unless it survives the "same level of review" as applies to a jury verdict. *Dow Jones & Co.*, 838 F.2d at 1293.

State supreme courts similarly apply the *Bose* independent examination rule with full force on summary judgment. Thus, in *Herbert* v. *Oklahoma Christian Coalition, Inc.*, 992 P.2d 322, 328 (1999), the Oklahoma Supreme Court, "independently [examining] the evidence in the record," rejected the plaintiff's claim that the defendant had misrepresented the plaintiff's voting record with actual malice. The court reasoned that the defendant's evidence established that the author of the publication at issue had "relied on various sources in reaching his conclusions about plaintiff's voting record." *Id.* at 330. Based on this evidence, the court concluded that the evidence presented by the plaintiff was "insufficient to rise to the level of 'actual malice.'" *Id.* at 329.

Similarly, in *Perez* v. *Scripps-Howard Broadcasting Co.*, 520 N.E.2d 198, 202 (Ohio 1988), the court "exercise[d] its independent judgment in deciding whether the evidence" could support a finding of actual malice with convincing clarity. Citing the defendants' evidence that they "conducted an investigation which produced no indication" that the statements

at issue were unreliable, the court held that no reasonable jury "could find actual malice with convincing clarity." *Id.* at 204.

Only a single court applies anything like the Ninth Circuit's rule that the *Bose* independent examination rule does not apply on summary judgment. The Third Circuit considers the entire record, which the Ninth Circuit pointedly refused to do. But the Third Circuit "discounts" the publisher's evidence and "marshal[s] all the arguments on behalf of the plaintiffs and draw[s] all inferences in their favor." *Schiavone Constr. Co.* v. *Time, Inc.*, 847 F.2d 1069, 1090-91 (1988). That court finds its standard necessary in light of the "limited posture" of the summary judgment stage. *Id.* at 1092.

Because the decision below conflicts with the holdings of several circuits and states' highest courts and is consistent with, at most, a ruling of only one circuit, certiorari should be granted.

2. Certiorari is also warranted because the decision below is erroneous. The Ninth Circuit refused to recognize that "actual malice" is not merely a jury question, but "a question of law" for the court. *Harte-Hanks Communications* v. *Connaughton*, 491 U.S. 657, 685 (1989) (discussing *Bose*, *supra*). Although questions that go to the predicate facts underlying the actual malice determination may properly be left for the jury to resolve, the judge has an independent obligation to decide whether the evidence can support a finding of actual malice because there is sufficient evidence in the record as a whole and because the plaintiff's theory, if accepted, would not intrude excessively on First Amendment freedoms. That *legal* question is properly resolved by the judge on a motion for summary judgment.

The Ninth Circuit erred in concluding that it was nonetheless compelled by *Anderson* v. *Liberty Lobby* to reject the application of the *Bose* independent examination standard on summary judgment. To be sure, *Anderson* stated that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." 477 U.S. at 249. But the "independent examination" rule of *Bose* does not call on the judge to "determine the truth" of contested underlying facts. Rather, the court undertakes "an independent

review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the parameters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose*, 466 U.S. at 505.

In reality, the Ninth Circuit's decision conflicts with *Anderson*, which explained that summary judgment presents "the threshold inquiry of determining whether there is the need for a trial." 477 U.S. at 250. A court properly concludes that no trial is warranted if there is insufficient evidence of actual malice or if imposing liability on the basis of the plaintiff's theory would excessively impinge on free speech. Further, a court cannot determine on summary judgment whether there is "*clear and convincing* evidence" of actual malice without considering the record as a whole. *Anderson* thus instructs the court to consider the "quantum and quality of proof," as well as the "character" and "caliber" of all the evidence, to determine whether the record is "*so one-sided* that one party must prevail as a matter of law" (477 U.S. at 251-52, 254 (emphasis added)), precisely what the Ninth Circuit refused to do.

In this case, for example, the district court and the dissenting judges recognized that all the evidence in the record, considered as a whole, could not establish with convincing clarity that CU had seriously doubted the truth of its speech. CU had submitted voluminous documents supported by affidavits, not simply protestations of innocence. Although a publisher's good faith will not always insulate it from liability, Suzuki's theory in this case turns on a supposed giant conspiracy among CU and its employees, such that (as Suzuki admits (C.A. Br. 9)) "the sole question before this Court concerns CU's state of mind." CU's honestly held concerns about the Samurai were furthermore confirmed by numerous other sources before CU made the 1996 statements now at issue. The Ninth Circuit erred in holding that the overwhelming evidence of CU's good faith and integrity is

irrelevant to "whether there is a need for trial" (*Anderson*, 477 U.S. at 250).[6]

3. The question whether and to what extent the *Bose* independent examination standard applies on summary judgment furthermore merits review in this Court because the decision below will chill core free speech. Summary judgment is a vital procedural mechanism for avoiding the enormous costs of trial in meritless defamation and disparagement cases. Aware that a disgruntled manufacturer can get to trial simply by, for example, "second-guess[ing] experimental design" (Pet. App. 68a (Kozinski, J.)) organizations will be less likely to report product testing "because of doubt whether it can be proved in court or fear of the expense of having to do so" (*New York Times*, 376 U.S. at 279). See, *e.g.*, *Torgerson* v. *Journal/Sentinel Inc.*, 563 N.W.2d 472, 478-79 (Wisc. 1997) ("[S]ummary judgment is an important and favored method for adjudicating public figure defamation actions."); Bruce W. Sanford, *Libel and Privacy* § 13.3, at 653 n.158 (1996-1 Supp.) (similar; collecting cases); see also Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 Ohio St. L.J. 1753, 1781-82 (1998) (under the *Bose* standard, "[w]hen pro-plaintiff judgments on the issue

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[6] *Masson* v. *New Yorker Magazine*, 501 U.S. 496 (1991), is not to the contrary. Petitioner's position is fully consistent with *Masson*'s holding that, "[o]n summary judgment, [the court] must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and the weight to be accorded particular evidence." *Id.* at 520. Nor do the facts of *Masson* assist respondent. *Masson* involved the falsification of direct quotations. This Court held that the publisher could not secure summary judgment on the basis of a reporter's typed notes of tape-recorded conversations with the plaintiff. The Court did *not* hold, however, that only the plaintiff's evidence is relevant on summary judgment. Instead, the Court explained that the plaintiff denied the statements in a sworn affidavit and that the notes conflicted with the tapes themselves. *Id.* Although Suzuki makes much of the fact that there are "tapes" in this case as well, there is no parallel here to the direct evidence of falsification in *Masson*.

of actual malice are appealed and subjected to independent review, over 66% are reversed," such that a system of independent review only after judgment is "inefficient both in terms of cost and time"); Martin B. Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. Cal. L. Rev. 707, 711 n.29 (1984) ("Approximately 75% of all motions for summary judgment by defendants on the issue of actual malice are * * * granted.").

The practical consequence of the refusal to apply the *Bose* independent examination rule on summary judgment and to consider CU's undisputed and detailed evidence of the absence of actual malice is that cases will proceed to trial based on speculation. The result will be "show trials" that impose enormous litigation costs that burden valuable speech. Proceeding to trial on the ground that a jury could find actual malice based on the *plaintiff's* evidence is a meaningless exercise when, at the *actual* trial, the jury would be presented with *all* the evidence. Further, in the Ninth Circuit, "review for sufficiency at summary judgment is now governed by one standard," while "review after a jury verdict is governed by another," such that cases "will now often proceed to trial, even though the court can tell ahead of time that the plaintiff's evidence will not support a jury verdict under *New York Times*." Pet. App. 53a (Kozinski, J.).

Speech by consumer organizations adverse to well-financed corporate interests is prototypically vulnerable to being deterred by litigation. But the chilling effect of the decision below extends "far beyond consumer organizations to virtually any research group that criticizes corporate interests" (Pet. App. 69a (Kozinski, J.)) and indeed to any media outlet. For the Ninth Circuit's crabbed reading of *Bose* logic applies to speech critical of a political candidate or of the war in Iraq. The effect of the Ninth Circuit's rule is that media defendants may be "crushed by the sheer expense of litigation," the very result that *New York Times*, *Bose Corp.*, and *Anderson* had sought to avoid. See *New York Times*, 376 U.S. at 279 (the fear in defamation suits is that "would-be critics * * * may be deterred from voicing their criticism [by] * * * fear of the expense" of litigation).

Indeed, if CU can be forced to go to trial in this case, it is hard to imagine what publisher would be safe. *Consumer Reports* has won numerous awards for its product ratings and safety testing, and CU is considered among the most independent and scientifically rigorous consumer ratings organizations in the world. Yet, on the Ninth Circuit's interpretation of the First Amendment, CU's detailed and undisputed evidence demonstrating its honesty, objectivity, and impartial testing is *irrelevant* at the summary judgment stage, since the only question for the court is whether the plaintiff could prevail on a "plausible view" of the evidence which it alone presents. Even the most careful and fair-minded publications can be subject to the expense of a full trial, no matter how strong or persuasive their evidence of lack of actual malice, so long as the plaintiff can hypothesize an "avaricious motive" for a decision regarding testing procedures.

That result is untenable in a nation that values free speech. Ratings publications like *Consumer Reports* "perform a valuable function in our consumer society," testing thousands of products to give the purchaser independent and reliable information that she could not gather herself. Pet. App. 68a (Kozinski, J.). As such, CU's reporting typifies the discussion of "public issues" that "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick* v. *Myers*, 461 U.S. 138, 145 (1983). Reviews of dangerous products like the Samurai can be a matter of "life-or-death." Pet. App. 64a (Kozinski, J.).

II. Certiorari Is Warranted To Review The Ninth Circuit's Holding That A Finding Of "Actual Malice" Is Supported By A Disagreement With A Government Agency And By A Publisher's Financial Status.

1. The Ninth Circuit in this case held that CU's "long-running debate" with NHTSA over "how to test rollover propensity most effectively" (Pet. App. 66a (Kozinski, J.)) could be deemed by a jury to constitute purposeful avoidance of the truth and thus could, standing alone, establish clear and convincing evidence of "actual malice" (*id.* 29a (majority)). "Drawing all reasonable inferences in favor of Suzuki," the

majority concluded that a jury could impose liability for CU's supposed failure to "engage in further investigation" in light of NHTSA's criticisms. *Id.*

This extraordinary extension of the "purposeful avoidance" doctrine cannot be reconciled with this Court's ruling in *Harte-Hanks* or with decisions of other courts. *Harte-Hanks* held that a newspaper's failure to make any attempt to interview a key witness supported a jury finding of actual malice. The Court reasoned it was "likely that the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of" the newspaper's statements. 491 U.S. at 692. The *Harte-Hanks* Court concluded that while "failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category." *Id.* (citation omitted).

The decision below conflicts with *Harte-Hanks* because, as the majority recognized but deemed irrelevant, CU "challenged the NHTSA report *head on*, stating its disagreement *in detail* and supporting its alternative conclusions *with substantive justifications*." *Id.* (emphases added). See generally App. G, I (CU analysis and published response to NHTSA). Congress itself recognized the merit of CU's position on a related matter in requiring NHTSA to develop a rollover testing program that includes "dynamic" tests. See Transportation Recall Enhancement, Accountability, and Documentation Act, Pub. L. No. 106-414, § 12, 114 Stat. 1800, 1806 (2000). The Ninth Circuit holds that a jury may find actual malice if it concludes at trial that NHTSA was correct in its criticism of CU's tests. But that would establish no more than that the review of the Samurai was in one sense "false," which this Court has said time and again cannot be equated with a finding of "actual malice." *E.g.*, *St. Amant* v. *Thompson*, 390 U.S. 727, 732 (1968).

Since *Harte-Hanks*, the lower courts have very sparingly applied the "purposeful avoidance" doctrine to deny summary judgment or uphold a jury verdict – petitioner has found just *four* such reported cases. *Peoples Bank & Trust Co.* v. *Globe Int'l Publ'g, Inc.*, 978 F.2d 1065 (CA8 1992); *Bentley* v. *Bunton*, 94 S.W.3d 561 (Tex. 2002); *Khawar* v. *Globe Int'l, Inc.*, 19 Cal.

4th 254 (1998), cert. denied, 526 U.S. 1114 (1999); *Prozeralik* v. *Capital Cities Communications*, 82 N.Y.2d 466 (1993). In each, as in *Harte-Hanks*, the defendant entirely failed to consult obvious sources that would have alerted it to the falsity of the statements. Mindful of this Court's admonition in *Harte-Hanks* that "failure to investigate will not alone support a finding of actual malice," the lower courts will find actual malice based on purposeful avoidance only when the defendant has refused to take even rudimentary steps to investigate a claim that it has been advised is at least very dubious.

So far as petitioner can determine, no other court has *ever* found "purposeful avoidance" based on a disagreement with a government agency. As Judge Ferguson recognized, if a jury can deem such a disagreement to be actual malice, the government will have "the sole voice in this field" (Pet. App. 45a), in this instance a voice that CU has criticized as being a "reluctant [consumer] watchdog" (*id.* 241). If a public interest organization can be subjected to a libel judgment when it adopts a protocol that differs from the government's and reaches a result a manufacturer dislikes, non-governmental voices will be at a marked disadvantage. As this Court recognized in *New York Times*, this kind of "pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." 376 U.S. at 278. By making disagreement with the government evidence of actual malice, the Ninth Circuit has endangered "the very center of the constitutionally protected area of free expression" (*id.* at 292), namely the "privilege to speak one's mind * * * on all public institutions" (*Bridges* v. *California*, 314 U.S. 252, 270 (1941)).

But even treating this case as more generally involving a scientific disagreement, rather than a disagreement with the government, the Ninth Circuit's decision conflicts with other circuits' holdings that a departure from established investigative standards does not constitute evidence of actual malice. In *Underwager* v. *Salter*, 22 F.3d 730, 736 (1994), the Seventh Circuit held that the plaintiffs could not establish actual malice by pointing to the defendant's repeated publication of statements

critical of the plaintiffs' conclusions regarding claims of child abuse. The court concluded that "[s]cientific controversies must be settled by the methods of science rather than by the methods of litigation." *Id.* Plaintiffs cannot "silence those who hold divergent views" on scientific questions "simply by filing suit and crying 'character assassination!'" *Id.* Similarly, as Judge Kozinski noted (Pet. App. 64a), the Second Circuit will find "purposeful avoidance" only if the publisher engages in an "extreme departure from standard investigative techniques." *Church of Scientology Int'l* v. *Behar*, 238 F.3d 168, 174, cert. denied, 534 U.S. 814 (2001).

2. The Ninth Circuit also accepted Suzuki's argument that CU's alleged financial needs in 1988 supported a finding of actual malice, even with respect to statements made eight years later. Suzuki hypothesized that CU in 1988 concocted a "blockbuster" story to increase the circulation of *Consumer Reports* in order to make money. Pet. App. 22a. This Court held in *Harte-Hanks*, however, that a publisher's "motive in publishing a story," such as "to increase its circulation," "*cannot* provide a sufficient basis for finding actual malice." 491 U.S. at 665 (emphasis added). The Court explained:

> Nor can the fact that the defendant published the defamatory material in order to increase its profits suffice to prove actual malice. The allegedly defamatory statements [soliciting contributions] at issue in the *New York Times* case were themselves published as part of a paid advertisement. If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels.

Id. at 667 (citations omitted).

The majority below erred in asserting that its holding could be reconciled with *Harte-Hanks* on the ground that CU's alleged financial motive "dovetail[ed]" with Suzuki's "test-rigging" theory. Pet. App. 22a. *Harte-Hanks* does not approve layering speculation upon speculation to strip away a speaker's First Amendment liberties. Although *Harte-Hanks* declined to hold that "evidence concerning [financial] motive * * * *never* bears

any relation to the actual malice inquiry" (491 U.S. at 668 (emphases added)), here there is absolutely *no* evidence from which one could reasonably infer that CU lied because of financial considerations. To the contrary, the district court found it undisputed that CU applied the highest ethical standards in its reporting on the Samurai. See *supra* at 6-10.

The court of appeals' holding that "clear and convincing evidence" of actual malice may be inferred in part from a publisher's financial condition presents a direct threat to an array of publishers – including particularly those engaged in public interest activities – given that the entire industry is vulnerable to vexatious litigation. Expeditious use of the summary judgment procedure "can serve a First Amendment purpose in the *New York Times* area," since the costs of litigation are often "as important a source of media self-censorship as the actual damage award itself." Jerome A. Barron & C. Thomas Dienes, *Handbook of Free Speech and Free Press* 352 (1979). See Thomas Littlewood, *Coals of Fire: The Alton Telegraph Libel Case* (1988) (noting that newspaper filed for bankruptcy after $9.2 million libel judgment); C. Thomas Dienes, *Libel Reform: An Appraisal*, 23 U. Mich. J.L. Reform 1, 13 & n.51 (1989) (noting that "[m]any small publishers are unable to afford libel insurance"); David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 Cal. L. Rev. 847, 860 (1986) (arguing that a small publisher will "try to minimize the risk of libel suits" rather than "risk an adverse verdict that could lead to bankruptcy").

Because the Ninth Circuit's holding that a jury may find "actual malice" based on disagreement with the government and a publisher's financial condition conflicts with decisions of this Court and other circuits, certiorari should be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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